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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-714

THEODORE G. DALEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

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Theodore G. Daley,

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v.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Theodore G. Daley, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 20, 1977.

Opinions Below

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed a judgment entered after a jury trial in the United States District Court, Southern District of New York (Hon. Morris Lasker, *J.*), which found petitioner guilty of conspiracy to violate and violating the Hobbs Act (18 U.S.C. 1951) and with improperly accepting goods and services in violation of 29 U.S.C. 186. Petitioner was sentenced to a suspended sentence and

three years' probation upon all counts and a $5,000 fine upon each of the counts charging violations of 29 U.S.C. 186 totaling $25,000.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. This petition for writ of certiorari is filed within 30 days of the entry of the Court of Appeals judgment of affirmance.

Questions Presented

1. Was the evidence legally sufficient to support a conviction for conspiracy to and violating the Hobbs Act, or was this prosecution an unwarranted extension of federal jurisdiction into a purely intra-state affair?

2. Did the trial court err in denying defendant's recusal motion?

3. Did the court err in finding that sufficient independent evidence existed such that the hearsay utterances of petitioner's co-conspirators could be considered as evidence-in-chief against him and by failing to dismiss the conspiracy count?

4. Is the rule in the Second Circuit which permits hearsay evidence to be utilized upon a showing that a conspiracy was established by a preponderance of the evidence legally erroneous and at variance with holdings by this Court and companion Courts of Appeals?

Statutory Provisions Involved

The Hobbs Act (18 U.S.C. 1951); the Landrum-Griffin Act (29 U.S.C. 186); 28 U.S.C. 455; 28 U.S.C. 144. These appear as Appendix B to this petition.

Statement of Facts

Theodore G. Daley was the secretary-treasurer and principal officer of Teamster's Local 445 which took in the upstate New York counties of Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan (T-40).† Within this geographic area, the union had employment jurisdiction over general freight, construction, furniture, cement plants, brickyards, bus driving industries (T-40).

The union operated various local hiring halls through its elected business agents (T-46). These business agents were charged with the responsibility of supplying employers with teamster employees (T-46). The assignment process did not operate in a manner such that the business agent would assign workers in a sequential fashion from a list. Rather, different skill requirements for a given job mandated a fluid assignment process (T-46, 47). Below the business agents, in the union hierarchy, were shop stewards (T-47). These positions were filled by the business agent or the secretary-treasurer (T-47).

The Windham Camp

Petitioner Daley* lives in Wappinger Falls, New York (T-48). In 1968, Anthony Alecca first learned of Daley's

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† References in parentheses refer to pages of original transcript of trial.

* Daley was originally a truck driver. In 1955, he became active in union affairs and was elected secretary-treasurer of Local 445 and ultimately over the years built up the local's membership from 2,000 to 8,000 members (T-130).

ownership of property in Windham,* New York (T-49). Alecca accompanied Vincent La Rocca, a member of Local 445, and Daley to the Windham house to work on its roof (T-50).

In the autumn of 1970, Daley first discussed his need for equipment at Windham, in this case a backhoe with a front-end loader on it, with Alecca (T-52). Later, in the summer of 1971, Daley and Alecca discussed the need for heavy equipment (T-53). Daley needed a small bulldozer but Alecca claimed he had trouble** finding one (T-53, 54). Ultimately, Tony Naccarato, a member of Local 445 who had a bulldozer and a "low boy" truck, transported the bulldozer over the road from Kingston to Windham (T-55).

A week or two later, Daley asked Alecca if he knew where a large bulldozer could be obtained (T-62). Once again, a "low boy" was obtained and the machinery transported to Windham (T-63).

In June 1971, Daley told Alecca that he had spoken to Clausi about obtaining beams for his cabin. Daley did not know why Clausi had been unable ot deliver them. Alecca would find out why (T-88). Clausi told Alecca he would have to speak to Mr. Marcelle of Callanan Road Improvement Company before the beams could be released (T-88). Alecca told Marcelle that the beams were for Daley and

* The Windham Camp consisted of a small frame house with two bedrooms, a foyer and kitchen (T-1365). In addition, a pool was installed on the 10 acre mountainous parcel (T-1508). Daley spent some $13,000 on his Windham camp (T-1445).

** Daley testified it was he who had the trouble getting local Windham contractors. Alecca told Daley he would send over a bulldozer that he, Alecca, was using up at his house (T-1485-1486). All three local contractors were too busy to accommodate Daley at that point in time (T-1487, 1490-1491). Daley denied failing to use local contractors solely because of the price they charged (T-1492).

were to be delivered to Windham (T-89). Ultimately, Clausi told him that the beams were sent to Windham (T-89).

Later still, Daley told Alecca he needed loads of one-inch stone* at Windham (T-73-74). In this connection, Alecca spoke to Tom Turco, the plant superintendent at the Kingston based Hudson Cement Company.** Turco told Alecca he would first have to get approval from his supervisor Robert Greene (T-78), before he could approve a donation of ten truckloads of stone (T-78, 438-440). It was Turco's understanding that since the material was going to be used to construct a driveway, "screening" *** and not crushed stone was being donated (T-443, 465, 466). Turco's supervisor Greene likewise believed that "screening" and not stone was being requested (T-482, 501, 504). It was not until the following day that Turco realized that stone had been taken instead of screening (T-467). Once Turco learned of this, he called Greene, who in turn called Tony Alecca. He asked Alecca what he was doing. Alecca told Greene of the need for additional material based upon a miscalculation. Permission was given to take a few more loads but, to Greene, the venture was "embarrassing". "Because what was a good will gesture is now taken advantage of everybody" (T-486).

Thereafter, Alecca told Tom Clausi, a Local 445 shop steward employed by the Callanan Road Improvement Company (T-81), to make arrangements to obtain trucks and drivers to deliver the stone to Windham (T-84).

* Daley denied asking for stone. He asked Alecca for waste material (T-1377, 1493, 1496).

** At that time, Hudson Cement had two labor contracts with Local 445 (T-79).

*** Screening is a dust-like material (T-483). Its value varies. At the time of the trial, Hudson Cement was backlogged with a quarter of a million tons of it. It was then a waste product (T-498).

Alecca told Clausi, then shop steward for Callanan Road Improvement Company, to contact Mike Spada and Bob Kozlowski* to have their trucks down at the Hudson Cement Company to get them loaded with "number one" stone (T-199). Once the stone was loaded**, Alecca would meet with Clausi and Spada at Spada's garage and indicate where it was to be delivered (T-201). The drivers consisted of Fred Perry, Frank Qualtere, Mike Spada Jr., Bob Snyder and others. There were some ten or eleven drivers in all (T-203). Daley was told that the stone would be delivered that evening (T-85).

After the trucks were loaded, Mike Spada Jr., Fred Perry, Frank Qualtere***, Bob Snyder, Robert Kozlowski,

* During the summer of 1971, Kozlowski, a member of Local 445 as well as a truck owner, had a job supplying trucks on the Callanan Thruway job (T-688). On the Friday prior to Labor Day, he received a telephone call from Clausi who told him to bring some trucks and drivers to the Hudson Cement Company (T-691). Kozlowski then asked a number of drivers, his brother Ron, Forte, Brennan, Stewart and Bockelmann, whether they would drive. Brennan and Stewart both refused. He then drove to Hudson Cement and loaded the trucks (T-692).

Kozlowski was finished loading in about a half hour (T-695). The caravan of trucks then left Kingston for Windham; the trip was interrupted for a stop for dinner (T-696). As Kozlowski was driving up Route 296, he saw Daley driving down the mountain in the other direction (T-698). He asked if Kozlowski's truck was going to Daley's camp. Daley was told it was (T-699).

Most of the stone was dumped directly on the property, except for a tractor-trailer which dumped its load in the middle of the road; its contents were ultimately pushed in with a bulldozer (T-701).

After the stone was dropped, the truckers headed for home, stopping to eat and drink beer (T-702). The finally arrived at home at 2:30 a.m. (T-703).

** Clausi went to Hudson Cement where he met Tom Turco. He told Turco that Alecca sent him down for number one stone. Turco told Clausi to have the trucks weigh in and to on the 3/8 stone pile (T-207-208).

*** Clausi contacted Qualtere somewhere on a highway. Qualtere was told he had to bring some waste material up to Daley's Wind-

Ronald Kozlowski, Joe Forte*, Dick Bockelmann**, and Herb Sutton made the Friday evening trip from Kingston to Windham (T-210, 211).

Clausi travelled ahead of the truck caravan (T-212). On the way up to Windham, Clausi met Petitioner, who was travelling down from Windham (T-213). Clausi told Daley that trucks with stone were on the way up to Windham and was told to begin dumping at the back end of Daley's cabin (T-214). The loads of stone were ultimately dumped that evening and the drivers returned home to Kingston by about 2:30 a.m. Saturday (T-221).

Several hours later, Ted Daley called Clausi and told him of the need for additional stone deliveries (T-222). Daley told Clausi he needed 20 or 30 more loads (T-223). Clausi arranged for it. He then called Bob Kozlowski*** and Mike Spada and asked them to come down to Hudson

ham camp (T-567, 568, 569, 589). He then picked up a Spada truck, went to Hudson Cement, picked up a load of waste and followed the other trucks to Windham (T-568).

The following morning, he spoke with Clausi, who told him of the need to drive up another load. He did this.

* Joe Forte was asked to make the drive to Windham by Bob Kozlowski (T-401). He participated in the loading at Hudson Cement Company and the drive to Windham. Forte also participated in the following day's trip (T-410).

** Bockelmann was contacted following his evening meal (T-337). He picked up a load of stone at Hudson Cement Company and was told he was driving it to Windham (T-341). He drove to Windham arriving at 10:00 p.m. (T-368), dumped his load in the cut behind Daley's cabin (T-346) and drove home (T-348). In addition to driving the truckload of material to Daley's camp, Bockelmann also supplied a truck which was driven by Joe Forte (T-356). This second vehicle was used to make an additional delivery of material the following day. Bockelmann was not paid for his services (T-356-358).

*** The following morning, at 7:00 a.m., Clausi called him and requested trucks and drivers (T-703). Kozlowski called Bockelmann, Forte and Stewart and they agreed to go (T-703). Ultimately, at 1:30 p.m., he went to Hudson Cement, loaded his truck

Cement and load their trucks for an additional trip to Windham (T-223-224).

Neither man objected, and at 1:00 p.m., some fifteen or sixteen trucks were loaded up with "dirty 3/8" stone (T-224-228). Among the drivers on this second trip were Tony Zmiarch, Frank Qualtere, Bob Snyder, Herb Sutton, Harley Williams, Frank Mahone, Bob Kozlowski, Ronald Kozlowski, Dick Bockelmann, Joe Forte, Collins Becker and Alton Stewart (T-225). Two teamsters refused to make the drive to Windham—Leland Eaton and William Brennan (T-225, 278-279). The fact of the refusal of these two men to volunteer their services was not reported to anyone (T-226, 280).

Anthony Naccarato, a member of Local 445, was employed as a shop steward by the Lizza Construction Company on Route 84 near Newburgh in September 1971 (T-510-511). On the Friday evening prior to Labor Day 1971, he received a telephone call from Chet Davis. As a result of his telephone conversation, Naccarato picked up a "low bed" truck, took it to Kingston (T-513). Alecca led him to the Daley camp with the bulldozer (T-515-516).

One afternoon, weeks later, Naccarato received a telephone call from Ray Ebert*, indicating that the bulldozer was no longer needed and that Naccarto could return it. He then picked up the bulldozer and returned it (T-521).

Alton Stewart was employed by Callanan Road Improvement Company and was a member of Local 445. Bob Kozlowski contacted Stewart and asked him to drive a load to

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with 3/8 stone (T-705), and drove up to Windham, arriving some two hours later (T-706). Kozlowski never asked Daley to compensate him for either his labor or for the cost of operating his trucks (T-756, 757).

* Ebert is a business agent for Local 445 (T-520).

Windham (T-535). Stewart refused (T-536). That evening he received a telephone call from Tom Clausi, asking Stewart to drive a load up to Windham because " . . . if I wanted a job, I had better go. So I told him I would take a trip up the next day" (T-537).

On Saturday morning Stewart received telephone calls from Bob Kozlowski and Tom Clausi indicating that the drive was being postponed until noon (T-537). He then picked up a truck, loaded it and drove to Windham (T-538). After dumping his load of stone, he returned home (T-540).

Daley was at the Windham house when the trucks arrived. He was working a bulldozer as the trucks pulled in (T-226). The stone was dumped and spread. The men were offered beer and water as refreshments (T-228).

At the quarterly union meeting, Clausi and Alecca told Daley they were sending up more trucks (T-1421). Clausi and Daley agreed that an additional seven or eight loads of stone were needed to complete the Windham driveway (T-229). Daley never asked where this material came from (T-1422).

The following Friday evening, September 10th, a number of trucks, including those of Mike Spada and Bob Kozlowski, drove to Hudson Cement Company where they loaded with "dirty" 3/8 stone (T-230). The following day, the stone was trucked to Windham (T-231, 711). Clausi accompanied Bob Kozlowski on the trip. Daley was not present when this Saturday delivery was made (T-1422).

In all, between 30 and 36 truckloads of material were driven to Windham* (T-239).

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* There were four or five Spada trucks and three Kozlowski trucks (T-710). Kozlowski paid for the gasoline for all his trucks (T-712).

Later in September 1971, Clausi and Daley had a conversation* outside the international teamster office in Washington, D.C. in which Daley asked Clausi to acquire some timbers** for Daley (T-241). Ultimately in October 1971, the timbers were obtained and delivered. These timbers had been used on the State thruway to divert traffic while repairs were made.

In late October or November, Alecca told Clausi:

"Ted [Daley] is hot. He wants the timber." (T-246)

As a result, Clausi spoke with John Callanan, the superintendent of Callanan Road Improvement Company. As a result of this, Callanan called Doc Marcelle, who then spoke to Alecca. Ultimately, the timbers were obtained and delivered.

Alecca indicated that to his knowledge, Hudson Cement was not paid for the stone it donated (T-89), nor was payment made for the timbers, nor were the trucking companies or the drivers paid for their services (T-90).

In April 1973, Alecca went to and was interviewed at the Kingston F.B.I. office. This trip was made subsequent to an unsuccessful attempt by the rival faction to defeat the "Daley" slate in the tri-annual union election.

In March 1974, Daley and Bob Kozlowski purportedly had a conversation at the union hall in which Daley told him that he could put Kozlowski's four trucks to work "tomorrow", but wouldn't (T-832).

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* Following this conversation, Clausi claimed Alecca called him several times indicating that Daley was on Alecca's back about the timbers (T-243).

** Daley insisted he spoke of the need for railroad timbers (T-1370). When they were delivered, Daley had no use for them. He complained to Clausi and Alecca about this. Alecca asked Daley to keep them because he could use them (T-1372-1374). Subsequently, Daley purchased the lumber he required at Windham Greenhouse Nursery and at the Poughkeepsie junkyard (T-1375).

The Question of Fear

It was Clausi's testimony that some of the men who were asked to deliver the stone to Windham were unhappy about the invitation.

> "Well, some of them were unhappy. I says, 'Look, I am just as unhappy as you are, but if you have any gripes, don't pick it out on me. Call Mr. Alecca, call Mr. Daley'." (T-239).

Clausi opined that the drivers were afraid that Clausi would transmit their unhappiness up to Alecca or Daley. Clausi denied that he would ever have done that (T-238). When asked why he was a participant in the drives to Windham, Clausi alluded to his family responsibilities and stated:

> "[F]rom the feeling I got around the union hall, you either did what you were told or you didn't work." (T-239).

On cross-examination, Clausi stated:

> "Ted Daley or Tony Alecca never put pressure on me. They never threatened me." (T-296)

Dick Bockelmann indicated that he participated in the drives to Windham to "insure" his job. He was concerned that if he did not:

> "[m]aybe there would be no more work for me some place." (T-364).

He concluded that Daley did not ask him to make the drive up to Windham (T-376). He likewise conceded that Daley had never denied him a job (T-277).

Joe Forte, who made three trips to Windham, claimed he drove because he believed his job would be in jeopardy

for non-participation (T-412, 417). He was not threatened during the period. During earlier grand jury testimony, Forte indicated that the talk of job loss was only a rumor.

To the best of Clausi's knowledge, none of the drivers were paid for their driving (T-239). Clausi was not paid, but then again, he did not expect to be paid (T-240, 264). Neither were Spada nor Kozlowski paid.

When the timbers were driven to Windham, the drivers were compensated because they were working on company time.

Tom Turco of Hudson Cement indicated that he agreed to provide the material because he felt that if he didn't, they would continue to aggravate him and make pests of themselves (T-450-451). He was also concerned that nit-picking grievances might possibly be raised at his plant (T-452).

At no time did Daley communicate the idea either that those who drove material filled trucks to Windham would help themselves or that if they refused to drive they would be hurt by losing their jobs (T-310-312, 602). Nonetheless, Clausi felt that if he or the other teamsters refused to drive that they would not have obtained employment on jobs controlled by Local 445 (T-313-314). Clausi denied threatening Alton Stewart that he had better haul stone or he would not be able to work (T-315). At no time did Daley pressure Tom Turco of Hudson Cement to donate material for the driveway (T-461). Indeed, Turco indicated that although 1971 was the contract year with Local 445, he did not consider that his refusal to donate material would have any effect upon the contract negotiations.

Bob Greene, Turco's supervisor, was motivated to donate material for the driveway because:

> "[I] could visualize that there could be problems, minor problems, which would result in loss of time or inspection of equipment that could be requested, which all affect the operating efficiency of the plant." (T-488).

He was concerned with possible union insistence upon application of all technical safety rules. Once the initial loads were taken, Greene just "wanted to get the situation finished with as soon as possible" (T-489).

At no time was Hudson Cement paid for the stone delivered to Windham (T-490). When the owner of Hudson Cement learned of the donation, he "chewed" Greene out for doing it (T-492).

Tony Naccarato indicated that he participated in the drives to Windham for a multitude of reasons:

> "More or less for friendship and to keep the ball and everything going smooth . . . The man was taking care of me. I was working steady. So I figured it wasn't going too far to go out of my way to do someone else a favor." (T-527)

Even when pressed by the prosecutor to speculate as to what he believed would happen if he failed to drive to Windham, Naccarato replied:

> "It was a toss up. I might not get a steady job later." (T-527)

Alton Stewart, who refused to participate in the Friday evening drive to Windham, but who did drive on Saturday after hearing from Clausi, claimed he participated because he feared that if he didn't:

> "There would have been a possibility that I may not have gained employment through the Union." (T-544)

While work assignments were made by the business agents, first by Alecca and later, after Alecca's heart ailment, by Mike Marco, a teamster could obtain employment on his own (T-553).

Frank Qualtere, who drove waste material up to Windham on the Friday evening and Saturday prior to Labor Day, indicated that he participated in the drive because Clausi told him ". . . you are working so you go or else you don't work." He was afraid that if he did not go he would not have continued working (T-575, 603).

Leland Eaton was employed on a Callanan job* on the Thruway in September 1971 when Tom Clausi contacted him. Although he was also asked to deliver a load of stone to Daley's camp, he refused to go. He told Clausi, "I will work whether I do it or not" (T-657). It was Eaton's belief that his failure to drive to Windham would not have economic repercussions.** "I felt an immune position . . . because I am a truck mechanic" (T-658).

Mike Spada told Eaton that Eaton did not have to participate if he didn't want to (T-1194, 1286).

Clausi never told Eaton that he would relate the latter's refusal to Petitioner. At no point after the trips to Windham were made was Eaton denied an employment opportunity because of his refusal to drive.

William Brennan was also working on the Callanan State Thruway job in early September 1971 when Bob Kozlowski contacted him and asked him to haul stone. Brennan refused to go; he had already made plans and

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* Eaton, however, was driving a Spada truck and also did repairs on Spada's trucks (T-657).

** He did, however, drive a truck down and saw to it that it was loaded (T-658). Eaton was not deprived of any work as a result of this posture (T-1287).

had no intention of changing them. The following Thursday, Clausi asked Brennan to haul material to Daley's camp. Brennan refused (T-674). Clausi warned Brennan that if he wanted to work the following Monday, he had better make the haul. Brennan retorted:

> "If I am not working Monday, there are places to go to find out why I am not working." (T-675)

The fact is that Brennan did work the following week, but instead of working by the hour, he was switched over and was paid by the number of tons driven. This change-over had no adverse economic impact on Brennan (T-676). Kozlowski never reported Brennan's refusal to drive to anyone from the Union (T-748).

Bob Kozlowski, who provided trucks on numerous occasions, testified that at no time did Clausi or Daley threaten him into hauling material to Daley's camp in Windham (T-833). He claimed, however, that he supplied trucks ". . . for my drivers' sake. I didn't want to see them have any hard feelings with the union over it." (T-833)

Herb Sutton was working on a Thruway job in September 1971 when Clausi told him that there was a need to make a "trip to the mountains" with a load of stone. When Sutton protested, Clausi told him:

> "You will either go to the mountains or be looking for a new job." (T-781, 789)

Sutton made the trip because:

> "I was afraid if I didn't go, I would lose my work. I needed the job." (T-784)

This discussion followed a talk with Mike Spada wherein he was told:

"[T]o go along with it and save myself a lot of grief and headaches and trouble." * (T-789)

This was the only time that Sutton was asked to drive material to Windham. Nonetheless, the following week Sutton remarked that he would not transport another load of material even if it cost him his job (T-791). Sutton was not terminated from his job as a result of these utterances. Rather, he worked up through November 27, 1971 on that job (T-801).

Mike Spada, the owner of a trucking business in Kingston, New York (T-1185), indicated that when Tom Clausi asked him if he minded sending a couple of trucks loaded with material up to Daley's camp, he had no objection (T-1192). Spada was never threatened or coerced into supplying trucks for the Windham trip (T-1192-1193).

Matthew Fitzgerald, the Vice President of Callanan Road Improvement Company which had a thruway construction project in September 1971, indicated that when he released a quantity of wooden beams for Daley's use, it was not prompted by fear that a failure to do so would result in union trouble (T-1294).

Even after Daley learned of the existence of a Federal investigation into his union activities and that teamsters were talking with the F.B.I., he never fired them or attempted to deprive them of work (T-1428).

Local Customs

It was not uncommon for union members to perform work on each other's property. Thus, a ravine behind Alecca's house was filled in with gravel which was delivered by Naccarato in trucks supplied by Bob Kozlowski,

* Spada denied ever telling Sutton this.

Mike Spada and Dick Bockelmann (98, 263, 361-362). The men were not paid for their work, but did receive a home cooked meal (98, 362).

In addition, union members and others came to Alecca's house and installed a concrete basement which had been delivered by Colonial Sand and Stone.

On another occasion, a bulldozer and loader was brought to Alecca's property. Later, still, Williams delivered "blue" stone to the back of Alecca's property to build a drainage field. Mike Spada's trucks were used for this purpose.

Furthermore, on one occasion, Alecca was given a pickup truck as a Christmas present which was paid for by members of Local 445.

On other occasions, Fred Perry and Bob Kozlowski* brought Alecca "run-a-back" gravel and Leland Eaton dumped fill in Alecca's backyard while using a Mike Spada truck. On numerous occasions, Alton Stewart also delivered loads of material to Alecca. He did this using Bob Kozlowski's truck. Similar trips were made by Qualtere (T-572). He did not pay for this. On one occasion, Alecca obtained material for use in his own driveway from Hudson Cement. On other occasions, Naccarato allowed Alecca to take fill from his property. Other times, Naccarato allowed relatives and friends to utilize his truck and bulldozer without charge.

The donation of material by Turco and Greene for use in Daley's driveway was not an unusual gesture. They frequently made donations as a "community relations" gesture (T-487).

* Kozlowski personally made three deliveries of material to Alecca's house, as well as loaned trucks for such purpose (T-750). A total of a dozen of Kozlowski's trucks were loaned in all (T-751).

On one or two occasions, Hudson Cement gave Alecca material following his complaints concerning the rendering of damage to his property caused by Hudson Cement. Another time, screening was donated for use in the construction of the parking lot at the union hall* (T-496). At no time did Daley ever ask Greene for any material (T-497).

It was also not uncommon for truckers to take, at no cost, the beams which road construction companies used as barriers and traffic dividers. Spada used the beams, with the consent of Callanan Road Improvement Company, for blocks under his trucks when repairs were necessary. No threats were ever involved in obtaining such beams.

Daley also worked for union members. On one occasion, Daley and his son helped Alecca work on his house. On another occasion, he worked on an inoperable cistern.

In addition, Daley did work for Alecca's neighbors, as well as on the home and/or property of Chet Davis, Ray Ebert, Brad Wilson and Bill McConnell. Similarly, Alecca helped Daley carve out the path for the circular driveway at Windham.

Purchases of Material and Labor

Dave Alexander sold Daley a quantity of "black-top" for the latter's driveway at his domicile in Wappinger Falls, New York. He also borrowed a bulldozer for use at the property.

When Daley decided to increase the size of the Windham cabin, he retained a local contractor to do the work. Similarly, when the pool was installed, the work was performed

* Kozlowski provided his trucks on that occasion (T-752). In addition, Kozlowski allowed his drivers to use his trucks. He also donated his trucks for use by community organizations (T-756).

by a contractor and was paid for. When a new roof was installed, the material was likewise purchased.

When Petitioner wanted work done on his driveway, he hired two contractors to do the work. In addition, bills for material purchased from Jack Landers Landscaping Center for railroad ties, from Frank Tompkins for contracting services, and Windham Lumber Company, indicated Daley's payment for materials obtained or services rendered.

Insofar as payment for the teamsters who drove from Kingston to Windham, Daley insisted he had several conversations with Alecca concerning his intention to compensate the men. Daley believed that payment of some $700-$800 would be fair to the truckers. Accordingly, he gave this money, in cash form, to Alecca at the Newburg union hall. This was confirmed by Chet Davis, who was present in the upstairs office in Newburgh when the money changed hands. Petitioner neither sought nor obtained a receipt from Alecca. He did not then feel a receipt was necessary. He conceded, in the light of future developments, that it would have been better to have given Alecca a check.

Daley did not check with the drivers to insure that the cash he gave to Alecca had actually filtered down to them. When an investigation began in 1973, Daley wanted to speak to the drivers to ascertain whether they had actually been paid, but did not do so upon the advice of counsel (T-1428).

Daley denied conspiring with anyone to extort materials for his Windham camp (T-1462). He also denied causing Clausi or Alecca to extort any materials for the Windham cabin (T-1462).

Following the Government's rebuttal case, it rested (T-1821). The Court then denied defendant's Rule 29 motion made at the conclusion of the Government's direct case, stating:

> "I am satisfied the Government has established the requisite showing as to interstate commerce under both Acts." (T-1823).

The Court then denied defendant's motion for a directed judgment of acquittal upon all of the evidence (T-1823).

Following closing arguments by both sides, the jury was charged on the applicable law. The jury convicted petitioner upon all seven counts charged.

On May 6, 1977, Judge Lasker imposed sentence upon petitioner.

REASONS FOR ALLOWANCE OF THE WRIT

POINT I

The Trial Evidence Was Legally Insufficient to Establish Conduct Violative of the Hobbs Act.

In this Court petitioner initially raises an issue we believe to be of great importance (a) in the administration of criminal justice, because of the immense burden upon the federal courts and agencies charged with administration of federal criminal law which results in misuse of the Hobbs Act, and (b) in halting federal intervention and usurpation of local law enforcement and state and local criminal statutes.

Indeed, this Court's recent (October 3, 1977) grant of certiorari in the case of *United States* v. *Culbert*, No. 77-

142, to review a judgment of the Court of Appeals for the Ninth Circuit (548 F.2d 1355) re-examining the thrust and application of the Hobbs Act to particularly local conduct, clearly demonstrates the pertinency and need for final appellate review of the Second Circuit's affirmance and reasons for affirmance of the application of the Hobbs Act to the case at bar.

The Government's resort to and the petit jury's finding that Daley's receipt of material from employers and trucks and trucking services from employees violated the Hobbs Act is, we contend, legally untenable. If a conviction under these counts* is permitted to stand, conduct heretofore reserved to the States and having an insufficient nexus to the exercise of Federal jurisdiction will have been assumed by the Southern District United States Attorney's Office at a time and under circumstances when the jurisdiction of the Federal courts is contracting and not expanding the focal point of its work. See *Paul* v. *Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976).

The trial evidence was legally insufficient to establish (1) that the acts alleged and proven at trial had any effect whatsoever on interstate commerce, (2) that the "victims" of the alleged extortion acted out of reasonable fear, and (3) that the acts alleged and proven at trial were in the nature of racketeering as required by the Hobbs Act.

A. *The Trial Evidence Was Legally Insufficient to Establish Racketeering as Required by the Hobbs Act.*

While the United States Constitution is a dynamic document, growing to meets the needs of each successive gen-

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* We raise no further legal challenge, in this forum, as to that portion of the verdict which found Daley guilty of violating 29 U.S.C. 186. Given the traditional play which the jury could exercise, its resolution against Daley is not contested herein.

eration and subject to applications not envisioned by the Founding Fathers, statutes enacted by Congress are not as flexible. Rather, they are static and must be applied only as intended by the framers of each specific piece of legislation.

The Hobbs Act was enacted ".. . . simply to prevent both union members and non-union people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce . . ." (see remarks of Congressman Hancock in 91 Cong. §11900 cited with approval by the Supreme Court in *United States* v. *Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 1011 (1973). However, as often happens when Congress passes criminal legislation to eradicate a *specific* societal evil, Congress utilized very *broad* language to facilitate the effective application of the statute in an attempt to cover all of the possible ills which it intended to correct. Unfortunately, this overbroad language of the Hobbs Act has been seized upon by overzealous federal prosecutors to bring essentially state violations within the jurisdiction of the federal courts—a result which was unintended by the Congress which enacted the Hobbs Anti-Racketeering Act.

Recenty, however, several courts have re-examined the limited scope of the Hobbs Act. The Supreme Court in *United States* v. *Enmons*, 410 U.S. 396, 93 S.Ct. 1007 (1973), found that the Hobbs Act does not reach violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective bargaining demands. After examining the legislative history of the Act, the Court reasoned that:

> "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in the federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." 400 U.S. at 411, 93 S.Ct. at 1015.

Relying on *Enmons* and further examining legislative history, both the Sixth and Ninth Circuits have very recently held that conduct, to be violative of the Hobbs Act, must come under the rubric of "racketeering". Therefore, activities which fall within the literal language of the statute will not be held to violate the law unless the activities constitute a form of racketeering.

Thus the Sixth Circuit, in *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976), held that the mere armed robbery of a discount store failed to charge "racketeering" under the Hobbs Act, but rather charged activity within the exclusive criminal jurisdiction of the State of Michigan. The court postulated that if the Hobbs Act encompassed the mere robbery of a business engaged in interstate commerce:

> "the robbery of a corner grocery store, pharmacy or gasoline service station, without more, would be a federal offense. The offense of armed robbery, traditionally a matter of concern under state criminal laws, would become a matter within the responsibilities of the United States Attorneys and the federal courts. The legislative history of the Hobbs Act and its predecessor statute demonstrate to our satisfaction that no sweeping result was intended by Congress." 542 F.2d at 304.

Therefore, the court concluded:

> "although an activity may be within the literal language of the Hobbs Act, it must constitute 'racketeering' to be within the perimeters of the Act." *Id.*

Similarly, the Ninth Circuit, in *United States* v. *Culbert*, 548 F.2d 1355 (9th Cir. 1977), *cert. grtd.* —— U.S. —— (Oct. 5, 1977), has

> "adopted the reasoning of the Sixth Circuit's eminently sensible opinion. . . . [A] contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the state. Consideration of federalism, apart from the legislative history also emphasized in *Yokley*, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the state sovereignty." 548 F.2d at 1357.

Thus the attempted extortion by defendant of $100,000 in bank assets by means of telephoned threats of physical violence were held to be unrelated, in any way, to "racketeering" and, therefore, not within the scope of the Hobbs Act.

Indeed, Chapter 95 of Title 18 of the United States Code, which encompasses, *inter alia*, the Hobbs Act and the Travel Act, is entitled "Racketeering".

The acts purportedly proven in the present case—namely, the receipt of materials and labor for a vacation home from union employers and employees who customarily helped one another out—are clearly not "racketeering" within the scope of the Hobbs Act. Testimony was given at the trial by various union members that on numerous occasions they had given or received assistance with respect to home improvement projects and by Mr. Greene,

the general manager of Hudson Cement, that they frequently made donations as a "community relations" gesture.

To paraphrase the words of the Sixth Circuit, to interpret §1951 to apply to the instant alleged activities "as urged by the Government, would encompass literally any [extortion] occurring in any state", *United States* v. *Yokley*, *supra*, at 304. "No such sweeping result" could have been intended by Congress. *Id.* at 305. The alleged activities are, in fact, under the exclusive jurisdiction of the State of New York. See, *N.Y. Penal Law* §155.40 (McKinney 1975).

Moreover, the theme of federalism with respect to the Hobbs Act, which runs through the decisions in *Enmons*, *Yokley* and *Culbert*, has not been totally ignored by the Second Circuit. In *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975), for example, the Court of Appeals found the effect of defendant's acts upon interstate commerce insufficient to warrant converting another locally prosecutable offense into a federal Hobbs Act violation.

More recently, in *United States* v. *Brecht*, 540 F.2d 45 (2d Cir. 1976), the Second Circuit affirmed that portion of an Eastern District judgment involving Hobbs Act violations but strongly questioned the advisability of stretching the Act to meet modes of conduct only marginally related to the theme of Congressman Hobbs' bill. See *United States* v. *Brecht*, *supra*, at 52 n. 14. Judge Gurfein recognized that "the main purpose of Congress in enacting the Hobbs Act was to combat labor racketeering". *Id.* at 51. The activities which are normally prosecuted under the Hobbs Act are those which are "the familiar tools of organized crime". *Id.* at 52.

In no sense can the alleged activities in the instant case be classified under the heading of organized crime. A

single incident involving the receipt of labor and supplies to be used in the construction of a driveway at a vacation home has no more connection with organized crime than does the robbery of a discount store. The coverage of the Hobbs Act should not be expanded to trespass upon traditionally state ground. The act alleged in the instant indictment constitutes, at best, a violation of the state's extortion statute. See *N.Y. Penal Law*, §155.40 (McKinney 1975). To hold otherwise would constitute judicial sanction of a federal "power grab" in violation of the sovereignty of the State of New York. Such a course should not be followed.

B. *The Trial Evidence Was Legally Insufficient to Establish Any Effect on Interstate Commerce as Required by the Hobbs Act.*

It is axiomatic that in order to constitute a violation under the Hobbs Act, an activity must have an effect upon interstate commerce. *Stirone* v. *United States*, 361 U.S. 212, 80 S.Ct. 270 (1960). "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." *Id.* at 218, 80 S.Ct. at 274.

The *de minimus* rule with respect to interstate commerce (see *United States* v. *Shackelford*, 494 F.2d 67 (9th Cir.), *cert. denied*, 417 U.S. 934, 94 S.Ct. 2647 (1974)), has prompted satisfaction of the interstate commerce requirement under the so-called "depletion of assets" theory. *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.) (en banc), *cert. denied*, —— U.S. ——, 96 S.Ct. 446 (1975). The Third Circuit's position is that:

> "where the resources of an interstate business are depleted or diminished 'in any manner' by extortionate payments, the consequent impairment of ability to conduct an interstate business is sufficient to bring the extortion within the play of the Hobbs Act." *Id.* at 642.

While recognizing the "depletion of assets" theory, the Second Circuit has narrowed the scope of its application. In *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975), the court stated:

> "Where the victim of an extortion scheme *customarily* obtains supplies through interstate commerce, the diminution of the victim's resources impairs his purchasing power and may therefore be found to affect interstate commerce for the purpose of the Hobbs Act. . . .
>
> "The victim's purchase of interstate goods, however, must be of a continuing nature, or the relationship between the extortion and any interstate commerce becomes merely conjectural." *Id.* at 54.

Merolla involved a contract to build a car showroom for defendant McNamara. Goberman, the general contractor and alleged victim of the extortion, engaged various subcontractors to supply materials and labor. With respect to the interstate commerce element, the evidence adduced at trial showed that (1) pursuant to a contract between Goberman (the victim) and Merkel Electric Co. for the installation of lighting apparatus, electrical supplies were delivered to the job site from out of state; (2) steel joists and steel roof decking were shipped interstate to the job site in satisfaction of orders which Goberman placed with Fiberproof Products, Inc.; (3) in fulfillment of an agreement between Goberman and Warren Brody for the installation of garage doors, doors were delivered to the job site from their place of manufacture in New Jersey; and (4) new automobiles which (defendant) McNamara sold at

the completed showroom were assembled in other states and transported into New York. *Id.* at 54.

Despite these facts, the court in *Merolla* held that the Government had failed to establish the requisite interference with interstate commerce and, accordingly, reversed the Hobbs Act conviction and remanded with instructions to dismiss the indictment.

Similarly, in the instant case, even when the trial evidence is construed in the light most favorable to the Government (see *Glasser* v. *United States,* 315 U.S. 60, 80, 62 S.Ct. 457 [1942]), it is patently clear that the conduct of Petitioner and his alleged co-conspirators had an insufficient impact on interstate commerce to warrant displacement of an inherently local prosecution by federal law enforcement agencies.

In the present case, Petitioner was convicted for allegedly extorting the use of manpower and trucks from union employees to transport materials obtained from union employers. The Government established at trial, in an attempt to satisfy the interstate commerce aspect of the Hobbs Act charges, the following: (1) that Local 445 had business dealings with the International Brotherhood of Teamsters (IBT) which is located in Washington, D.C.; (2) that the trucks used to transport the materials and the gas used to run the trucks were purchased from companies involved in interstate commerce; (3) that the truck drivers who transported the materials happened to be engaged with the construction of a highway; and (4) that Hudson Cement, who supplied the stone, shipped cement out of New York State, although it rarely shipped stone to other than New York City.

Any affect on interstate commerce by the just-mentioned factors is so farfetched and speculative as to be less than

the conjectural affect established in *Merolla.* If a Hobbs Act conviction can be sustained on such a weak foundation with respect to the interstate commerce requirement, local prosecution of the crime of extortion can be subsumed at the whim of federal prosecutors.

The connection between the IBT and this case is so remote as to be non-existent. The alleged extortion occurred because of defendant Daley's position with Local 445. That Daley may have extorted materials and labor for a vacation home has absolutely no impact on dealings between the local and the IBT.

Virtually all motor vehicles and gasoline are produced in interstate commerce. Allowing a conviction under the Hobbs Act because the trucks used to transport the stone and timbers and the gas used to run the trucks were purchased from interstate concerns would turn any extortion into a federal case if a motor vehicle becomes involved. Such a result is absurd.

The fact that the drivers who transported the stone to Mr. Daley's upstate property happened to be engaged in the construction of an interstate highway also has a less than remote connection with interstate commerce. The transportation of stone took place after hours and on weekends. What the drivers do on their free time is their own personal business. That they may have been victims of extortion during this free time should not be elevated to a Hobbs Act violation simply because their jobs entailed interstate activities.

Finally, although Hudson Cement shipped some cement out of state, Mr. Greene, Hudson's general manager, testified that they shipped "practically all" of their stone to New York City. Under *Merolla, supra,* the relationship between the alleged extortion and interstate commerce be-

cause of these small, irregular shipments becomes merely conjectural.

Due to the conjectural nature of the effect which the alleged extortion had on interstate commerce, it is incumbent that the convictions under Counts I and II involving the Hobbs Act be reversed and the indictments dismissed.

Alternatively, if any one of the allegedly extortionate activities—namely, the extortion of the trucks, the truck drivers, the gas, the stone and the timbers—is found to have had no effect on interstate commerce, the Hobbs Act convictions should be reversed. This result is mandated because the Government submitted these separate extortions under one conspiracy count and one substantive count. It is possible that the jury found extortion with respect to one activity, e.g., the stone, but not with respect to all the activities. Therefore, if the interstate commerce aspect is insufficient to support a conviction of any one of the alleged extortions, it is respectfully submitted that Counts I and II of the conviction should be reversed.

C. The Trial Evidence Was Legally Insufficient to Establish Reasonable Fear as Required by the Hobbs Act.

As indicated in *United States* v. *Rastelli,* 551 F.2d 902 (2d Cir. 1977), *cert. den.,* —— U.S. —— (22 Cr.L. 4016 October 3, 1977), a conviction under the Hobbs Act for extortion by fear must be founded on "reasonable fear in the mind of the 'victim' ".

However, when the trial evidence is considered in the light most favorable to the Government, it is still obvious that it was neither fear created or knowingly and intentionally capitalized upon by defendant Daley which motivated the drivers and employers to volunteer goods and services for the Windham camp.

Paramount in this respect is the proven fact that Daley never made any threats to any of the drivers or employers. Nor was there evidence that he had even threatened others in any prior or subsequent incidents. Moreover, it is significant that more than one driver refused to participate when asked by Alecca and Clausi. Nevertheless, no retribution was forthcoming against those who did not take part. There was also evidence of a cash payment of $100 to $800 by Daley to Alecca for distribution to the drivers for their services. Finally, in light of the local custom of union members in aiding one another on home improvement projects and the custom of Hudson Cement in donating materials as a community relations gesture—e.g., they donated material for a driveway at the union hall—it is clear that the reasonable fear envisioned by the Hobbs Act was not present in this case.

Accordingly, the guilty verdicts on the Hobbs Act counts should be set aside.

POINT II

The Government's Failure to Competently and Independently Establish a Conspiracy as a Condition Precedent to Its Use of Conversations of Alecca and Clausi Requires Dismissal of Count I. The Consideration of Their Testimony as Evidence in Chief Was Evidentiary Error.

Theodore G. Daley stands convicted of Hobbs Act violations not because of what he said or did, but rather because of the words and deeds of Anthony Alecca and Thomas Clausi, men whom the Government has characterized as co-conspirators such that their statements, both amongst themselves and, most important, those utterances to the suppliers of materials and trucks and the truck

drivers who were asked to drive to Daley's Windham camp, would be admissible against Daley. The defense posture throughout the case was an emphatic denial that Daley entered such a conspiracy to extort materials for use at the Windham camp or the use of trucks and drivers to haul that material up the mountain from Kingston.

Rather, the defense contended that the materials were brought to Windham because the drivers freely volunteered* their services, and the drivers of the denoted materials regarded them as essentially useless waste products.**

Furthermore, if pressure was brought to bear, it was, the defense contended, the independent voluntary decision of Alecca and Clausi*** to apply it, and not due to any agreement, understanding or acquiescence of Daley.

In this context the question whether the Government independently established a criminal agreement to extort materials from teamster employers and driving services from teamster drivers was the paramount issue upon which the case turned.

The defense strenuously objected to the admission of the otherwise hearsay conversations of Alecca and Clausi,

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* Daley contended, without contradiction, that he gave Alecca $700-800 in cash for transmittal to the drivers. This money apparently never made it past Alecca because the drivers did not receive any money.

** Daley had asked for screening for use in building a driveway and damaged highway road dividers from a State thruway job.

*** In the time period in question, 1971, Alecca was President of Local 445 and a business agent. Clausi was a shop steward employed by the Callanan Road Improvement Company. Each had a separate image and identity from that of Daley to independently demand material with a sense of credibility and/or "throw Daley's name around" by attributing a potential for harm or retribution if cooperation was denied but which never existed.

claiming there was insufficient evidence independent of the words and deeds of the alleged co-conspirators to establish that a criminal agreement existed (see *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969)) sufficient to permit the testimony to be received under the co-conspirators exception to the hearsay rule. *See Federal Rules of Evidence*, Sec. 801(d)(2); *Dutton* v. *Evans*, 400 U.S. 74, 91 S.Ct. 210 (1970). Ineed, we contend that the trial record is barren of any evidence, independent of the declarations of Alecca and Clausi, from which evidence of a conspiracy might be found.

We are mindful that the rule in the Second Circuit as established in *United States* v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977), is that the Government bears a lesser burden (i.e., by the preponderance of the evidence) in establishing the existence of a conspiracy for the evidentiary purpose of introducing evidence under the co-conspirators rule than it does ultimately in attempting to sustain a court's ruling submitting a conspiracy count to the jury. See *United States* v. *Stanchich, supra*, p. 1299. This standard is, of course, in derogation of the standard mandated in *United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 3104 n. 14 (1974), wherein this Court required that the independent evidence be sufficient to take the question to a jury, not merely by a preponderance of the evidence. Such direct conflict between the Second Circuit and the other federal circuits, as well as the highest court in the land, alone raises a question of law worthy of review by this Court.

It is elementary, of course, that to constitute a conpiracy there must be an agreement or meeting of the minds, and unless the parties actually do agree to engage in particular conduct, there is no conspiracy. *See United States* v. *Falcone*, 311 U.S. 205, 210 (1904); *United States* v. *Rosen-*

blatt, 554 F.2d 36 (2d Cir. 1977). Thus, even if Alecca and Clausi believed Daley desired free materials and trucking services, but Daley himself, as the uncontradicted testimony shows, wanted waste material and volunteer drivers, then as a matter of law there could be no conspiracy because there was no agreement as to the essential nature of the plan. Where the alleged co-conspirators have different understandings and act with distinctive *mens rea,* a conspiracy, as herein, to violate the Hobbs Act may not be found. See *United States* v. *Rosenblatt, supra,* p. 41. Such was the case herein. Thus Judge Lasker erred when he held that a proper basis was established sufficient to permit the jury to consider the hearsay statements as evidence in chief.

A. *The Submission of the Conspiracy Count to the Jury.*

Even assuming *arguendo* that this Court is persuaded a proper basis existed sufficient to sanction Judge Lasker's ruling that the hearsay testimony of Alecca and Clausi should be considered by the jury, such approval does not foreclose review of the Court's denial of defense counsel's request not to submit the Hobbs Act conspiracy count to the jury. Indeed, *United States* v. *Stanchich, supra,* p. 1299, admonishes the trial bench that not only are two distinctive rulings involved, but emphasizes that an appreciably higher standard must be applied to a defendant's motion to prohibit submission of the conspiracy count to the jury.

In the latter case the standard is:

> "[W]hether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind fairly conclude guilt beyond a reasonable doubt."

See *United States* v. *Taylor,* 464 F.2d 240, 243 (2d Cir. 1972); *United States* v. *Stanchich, supra,* p. 1299.

In contending, as we do, that sufficient evidence establishing a conspiracy to violate the Hobbs Act was not produced, we are not asking this Court to substitute its judgment on questions of fact or matters of credibility. Rather, we contend, applying the *Taylor* standard, that there was simply insufficient evidence to warrant submission of the Count to the jury. Such submission was clear error warranting review by this Court.

POINT III

Because of the Court's Status as the Trial Judge in a Prior Proceeding Wherein the Court Passed Upon the Credibility of Raymond Ebert and Theodore G. Daley and Found Against Local 445, the Court Should Have Recused Itself.

Because the Honorable Morris E. Lasker has previously been required to pass upon the credibility of key defense witness Raymond Ebert, the defendant Theodore G. Daley specifically, and the general operations of Local 445 generally, it was necessary that the Court recuse itself from presiding further in the trial of this case. Under these circumstances, recusal was required as a matter of law, as an exercise of judicial discretion in order to assure the fair and impartial trial guaranteed to Mr. Daley by the Constitution (Amend. V, VI and XIV), and as required by the Code of Judicial Conduct. The Canons of Judicial Ethics strongly suggest that a judge who finds himself in this posture disqualify himself.

The first canon states that the Code's provisions are to be construed in accordance with the highest standards of judicial conduct. These standards further mandate that a

judge "avoid impropriety and the appearance of impropriety in all his activities" and "perform the duties of his office impartially and diligently".

It is respectfully urged that the high standards for judicial performance as set forth by the Code were not met since his Honor presided at the trial of defendant Daley. In light of the nature of the relationship between this Court and defendant Daley and the witness Ebert arising out of a prior civil litigation involving union activity scarcely a year prior to the occurrence of the acts charged in the indictment, coupled with Judge Lasker's fact-finding in conjunction thereto, the appearance of a lack of impartiality may be viewed by many.

By mandating a Judge's disqualification in such a situation, the Code lends support to the better-reasoned view that just as justice must be maintained by the judiciary, so must the appearance of justice and the absence of prejudgment. *Offutt* v. *United States*, 348 U.S. 11 (1954); *Berger* v. *United States*, 225 U.S. 21, 34-35 (1921); *Mitchell* v. *Sirica*, 502 F.2d 375, 381-382 (MacKinnon, J., dissenting); *Hoiry* v. *Lavine*, 553 F.2d 845, 851 (2d Cir. 1977); *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941); J. MacKenzie, *The Appearance of Justice*, 241 (1974).

In addition to the Fifth Amendment and the Sixth Amendment rights to a fair trial and the provisions of the Code of Judicial Conduct, federal statute provides for the disqualification of a judge for bias or prejudice or by reason of his interest in the parties or the proceedings. Title 28, U.S.C. Section 455 (1970) provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

Title 28, U.S.C. Section 144 (1970), which provides for the disqualification for bias or prejudice of the judge, states in pertinent part:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.*" (Emphasis supplied.)

Although the courts have not been uniform in their interpretation of the above statutes, it is the better-reasoned approach to construe them with due regard for their underlying purpose, i.e., the protection of the accused's constitutional right to a fair trial before a neutral and detached judge. This purpose necessarily contemplates the maintenance of the appearance as well as the actual existence of impartiality on the part of the judge. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968); *In re Murchison*, 349 U.S. 133 (1955); *Offutt* v. *United States; Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Berger* v. *United States, supra; Mitchell* v. *Sirica, supra; Note, Disqualification of Judges for Bias in the Federal Courts*, 79 Harv.L.R. 1435 (1966); *Note, Disqualification of a Federal District Judge for Bias—The Standard Under Section 144*, 57 Minn.L.R. 749, 760-762 (1973).

In denying defendant's application for a mistrial and motion for recusal, the Court leaned heavily upon the fact that its status in the prior civil matter was a matter of

public record and, hence, the grade school educated Daley had waived any basis for recusal by not moving pre-trial on this basis. At the same time, the Court found as a fact that defense counsel was unaware of this prior proceeding.

We submit that where a defendant becomes aware* of the fact that his trial judge had a prior involvement with himself and his enterprise and the criminal trial focuses upon the defendant's conduct as a leader of the enterprise, it cannot be said that the lay defendant has waived his right to request recusal of the trial court.

In so contending, we do not mean to suggest that a recusal motion can never be waived. Thus, in *Galella* v. *Onassis,* 353 F.Supp. 196 (S.D.N.Y. 1972), *aff'd in part, rev'd in part,* 487 F.2d 986 (2d Cir.), Judge Cooper properly ruled that a recusal motion was untimely because the proffered grounds were informally raised by movant a month prior to trial and no motion was filed.

Similarly in *United States* v. *Civella,* 416 F.Supp. 676, 680 (W.D.Mo. 1975), the trial court found, *inter alia,* that counsel had actual knowledge of the facts for a considerable period and yet did not file his motion. In the case at bar, of course, the Court found that defense counsel had no awareness of the facts until the crucial side bar conference.

Concededly, in *Hirschkop* v. *Virginia State Bar Association,* 406 F.Supp. 724 (E.D. Va. 1975), the Court held that a recusal motion was untimely made because the information underlying the motion was "known or knowable" at a much earlier time than when the motion was filed. It is important to note that petitioner was an attorney and the

* The Government's awareness of the Court's status and its attempt to affirmatively utilize the Court's prior findings were the moving force prompting defense counsel's recusal motion.

standard to which he personally would be held to is and should be higher than that of Daley, who had minimal formal education and to whom the Court's identity would not have struck a responsive chord.

Likewise, in *Johns Hopkins University* v. *Hutton,* 316 F. Supp. 698 (D. Md. 1970), the lack of timeliness contributed to denial of recusal, but importantly because the motion was not filed until May 12, 1970 and was dependent, in part, on facts previously alleged in a prior affidavit filed on July 31, 1969 and related to facts known or knowable as early as February 3, 1967. When such a factual hiatus is compared to the promptness with which defense counsel moved in the case at bar, it is clear that its holding vis-à-vis timeliness is distinguishable.

Similarly the decision in *Smuck* v. *Hobson,* 408 F.2d 175, 183 (D.C. Cir. 1969), which upheld former District Judge, now Court of Appeals Judge J. Shelly Wright's decision not to recuse himself in a civil quality of education case where the recusal allegations were based upon prior published legal philosophy and claimed improper remarks by the Judge, from the bench, two weeks prior to the filing of the motion. Once again, the facts are clearly distinguishable from both the basis and dispatch with which defense counsel moved.

The true rule appears to be that the question of timeliness for a refusal motion raises a question of degree, and that timeliness must be asserted after actual knowledge of the allegations for disqualification are ascertained. See *Satterfield* v. *Edenton-Chowan Board of Education,* 530 F.2d 567, 574-575 (4th Cir. 1975); *United States* v. *Patrick,* 542 F.2d 381, 390 (7th Cir. 1976).

It is clear that the cases relied upon by the District Court as its basis for denying the recusal motion (T-1270-1271)

are factually distinguishable, and neither mandated nor suggested the result adopted by the Court.

Under the facts of the case at bar, the interest of avoiding the appearance of bias and injustice clearly outweighed the small inconvenience that reassignment to another judge in a multi-judge district would have placed upon the expeditious administration of justice.

Accordingly, and in light of the Court's status as the Judge in a prior civil labor case involving the defendant in the case at bar and a vital defense witness, the District Court erred in failing to disqualify himself from further presiding at the trial and in not declaring a mistrial. Certainly, at the very least, the Court was obligated to follow 28 U.S.C. 144 and await a determination by a brother District Judge on the merits of the recusal application. This failure to refer, as well as the ultimate determination of the recusal application, were errors requiring a *vacatur* of the judgment and a new trial.

Because this Court has not passed upon the applicability of 28 U.S.C. 455(a) to the facts of a criminal case, the case at bar provides a satisfactory fact pattern for such a decision. Indeed, the absence of an authoritative opinion by this Court in this area is particularly vital to afford guidance for all federal trial judges.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit and pair this case for oral argument with *United States* v. *Culbert*, 77-142.

Respectfully submitted,

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APPENDIX

Appendix A—Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 4—September Term, 1977.

(Argued September 27, 1977 Decided October 20, 1977.)

Docket No. 77-1262

UNITED STATES OF AMERICA,

Appellee,

—against—

THEODORE G. DALEY,

Defendant-Appellant.

Before:

MOORE, FEINBERG and MULLIGAN,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* after a jury trial, for violations of the Hobbs Act, 18 U.S.C. § 1951, and the Landrum-Griffin Act, 29 U.S.C. § 186(b)(1), (d).

Affirmed.

KENNETH V. HANDAL, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Frank H. Wohl, Frederick T. Davis, Asst. United States Attorneys, of Counsel), *for Appellee.*

GUSTAVE H. NEWMAN, New York, New York (Roger Bennet Adler, New York, New York, of Counsel), *for Defendant-Appellant.*

MULLIGAN, *Circuit Judge:*

Theodore G. Daley appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a three-week trial before the Hon. Morris E. Lasker, *District Judge,* and a jury. The indictment which was filed on August 3, 1976 contained one count charging Daley with conspiracy to violate the Hobbs Act[1] and another count charging him with extortion, a substantive violation of the Hobbs Act, 18 U.S.C. § 1951. The indictment also charged Daley, a union official, with five counts of accepting goods and services from employers of union members in violation of the Landrum-Griffin Act, 29 U.S.C. § 186(b)(1), (d). The jury found Daley guilty on all seven counts on March 10, 1977. Judge Lasker suspended the imposition of sentence on all counts and placed Daley on probation subject to special conditions for three years. He also fined Daley $5,000 on each of the five Landrum-Griffin Act violations. The defendant has not appealed from the judgments of conviction on these five counts but has limited his appeal to the convictions under the Hobbs Act contained in the first two counts of the indictment.[2]

1 Anthony Alecca, Jr. and Thomas Clausi were named as unindicted co-conspirators in the indictment.

2 Under the concurrent sentence doctrine as a matter of discretion this court could refuse to review the validity of the convictions in a multi-count indictment when the conviction on one count was proper and concurrent sentences have been imposed, *Benton* v. *Maryland,* 395 U.S. 784, 787-91 (1969); *United States* v. *Beverly,* Dkt. No. 76-1393, slip op. at 6047 (2d Cir. Sept. 19, 1977). Here Daley has not appealed his convictions of the five disdemeanor counts and concurrent sentences have been imposed. However, both the appellant and the Government agree that the doctrine should not apply where it may involve possible adverse collateral effects upon the appellant. *Benton* v. *Maryland, supra,* 395 U.S. at 790 and n.5 (1969). Here the convictions under the Hobbs Act are felonies which create a number of penalties under State law not invoked against those who are found guilty of misdemeanors. In addition, Daley's convictions under the Hobbs Act clearly bar him from serving as an official of a labor union for a specified period. 29 U.S.C. § 504. Whether the misdemeanor convictions under Landrum-Griffin would create a similar bar is not settled and we take no position on that issue.

I

Since 1956 the appellant Daley has been Secretary-Treasurer, or principal officer, of Teamsters Local 445 (Local) which has several thousand members and a territorial jurisdiction which embraces the counties of Westchester, Putnam, Dutchess, Rockland, Ulster, Orange and Sullivan in the State of New York. The evidence presented by the Government indicated that in the summer of 1971 Daley requested Anthony Alecca, Jr., the President and number two officer of the Local, to obtain for him some stone for the purpose of constructing a driveway for Daley's camp or mountain cabin in Windham, New York. Alecca then approached Thomas Turco, who was a superintendent for Hudson Cement in Kingston, New York, and requested approximately ten loads of stone for Daley's use. Turco in turn discussed the matter with his superior Robert Greene, general manager of Hudson Cement, an employer which was then in contract negotiations with Local 445. Greene decided to provide Daley with a couple of loads of stone in order to avoid any union problems. Daley was then advised through Alecca that Hudson Cement would supply the stone. The next step was to obtain the equipment and personnel for the project. Alecca instructed Thomas Clausi, the Local 445 shop steward on a project to repair the New York State Thruway near Kingston, to

arrange for the trucks and truckers. Alecca told Clausi to have two Local 445 owner-operators provide dump trucks and drivers to load and haul the stone after working hours. Eventually, stone was delivered to Daley's cabin on three separate occasions. September 3, 4 and 11, 1971.

In all, thirty to thirty-six truck loads of stone totalling about 600 tons were delivered by union drivers to Daley's cabin. Some ten to fifteen ten-wheel dump trucks, a tractor trailer and other equipment supplied by Local 445 owner-operators and contractors who employed union members were used to make the deliveries. The stone was then selling at a delivered price of nine dollars per ton at Windham, which was 60 miles distant from Kingston where the stone was located. On none of these trips were the drivers paid for their labor or the truck owners for the use of their equipment or fuel.[3] Hudson Cement received no reimbursement for the stone it supplied.

The record amply demonstrates that Daley was fully aware of the arrangement, directed where the stone was to be placed and was insistent that sufficient stone be delivered to satisfy his needs.

Clausi testified that in making the arrangements for the stone deliveries he was just following orders. He also testified to his belief that if he or the union members had refused to make the hauls they would not have received work. One owner-operator testified that he made a delivery to insure his job. Another, Robert Kozlowski, testified that he agreed to the hauls so that his drivers would

3 There was testimony that in the Kingston community where most of the drivers lived it was not unusual for Local members to lend their trucks to close friends for short hauls of two or three miles. Daley, however, lived in Wappingers Falls, thirty miles from Kingston. He was not a member of the local community nor was he personally acquainted with the drivers.

not lose work. Kozlowski further testified that in March, 1974, after the investigation into this matter had begun, Daley told Kozlowski that he could put Kozlowski's four trucks to work but would not do so. Several Local 445 drivers also testified that they made deliveries only because Clausi threatened that they would lose their jobs if they refused.

In addition to the stone, Daley later advised Clausi that he needed some twelve-inch by twelve-inch wooden beams. Clausi secured some twenty to twenty-five painted beams from the Maggiola Construction Company. The beams were hauled to Daley's cabin from Pearl River, some sixty miles south of Kingston, by an employee of Callanan Industries, the contractor on the Kingston Thruway job. The employee was paid for his services by Callanan. An additional twenty-two beams costing $34 to $35 each were provided by Callanan Industries and were delivered to Daley's cabin by a Local 445 driver on Callanan's payroll. Daley again had instigated the delivery of the beams and had helped unload one shipment. No payment was made for the beams.

Daley testified in his own defense, taking the position, in substance, that the stone delivery was Alecca's idea and that he believed the stone was waste material. He further testified that the delivery of the beams was a complete surprise and that he kept them at Alecca's request. Daley denied that he asked Clausi for additional stone after the first delivery on September 3, and claimed that he paid Alecca $700 or $800 to distribute among the truck drivers.

Daley also called a number of witnesses. Chester Davis, the current President of the Local, testified that he overheard a conversation between Daley and Alecca concerning the trucking of material to Windham, during which

discussion Daley gave Alecca money. Raymond Ebert, another union official, testified that although Daley was the union boss he did not control which union members worked. One Local owner-operator and three of his drivers testified that they made the deliveries to Daley's cabin without fear of reprisal if they did not participate. Two of these witnesses testified that the material they delivered to the cabin was waste although this was contradicted by their prior testimony before the Grand Jury.

Clearly the evidence at trial presented issues of credibility which the jury resolved adversely to the defense.

II

On this appeal Daley argues that the trial evidence was legally insufficient to establish a Hobbs Act violation.

A. The first contention made by the appellant is that the acts alleged and proven at the trial had insufficient impact on interstate commerce to fall within federal jurisdiction. We commence with the premise that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U.S. 212, 215 1960).

The pertinent language of § 1951(a) is indicative of the congressional intent. "Whoever *in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . ." is in violation of the Act (emphasis added). Construing this language, this court has held that "[s]tated differently, extortion or threats of violence need affect interstate commerce only in a minimal degree to constitute a violation." *United States* v. *Tropiano,* 418 F.2d 1069, 1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). "[I]t

is enough that the extortion in any way or degree [citation omitted] affects [interstate] commerce, though its effect be merely potential or subtle." *United States* v. *Augello,* 451 F.2d 1167, 1169-70 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972). Furthermore, it is not necessary that the purpose of the extortion be to affect interstate commerce. *United States* v. *Varlack,* 225 F.2d 665, 672 (2d Cir. 1955). It is sufficient that one of the natural effects of the offense is an obstruction of that commerce. *United States* v. *Addonizio,* 451 F.2d 49, 77 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

Here the victims of Daley's scheme of extortion were workers and contractors on the New York Thruway, a major artery of interstate commerce. The threats which forced compliance were the loss of continued opportunities to work on that interstate highway. The jurisdictional requirement of the Hobbs Act has been held to be satisfied merely by the exaction of tribute from local contractors erecting facilities to serve an industry engaged in interstate commerce. *United States* v. *Addonizio, supra,* 451 F.2d at 76-77. *A fortiori,* extortion directed at those constructing part of an interstate highway, which is an instrumentality of interstate commerce, falls within the jurisdictional scope of the Hobbs Act. The requisite impact on interstate commerce has also been found where the resources of a business engaged in interstate commerce are diminished by extortion, thereby permitting the inference that as a consequence of the extortion the operations of the business have been delayed, obstructed or in some way affected. *United States* v. *Mazzei,* 521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Augello, supra,* 451 F.2d at 1170; *United States* v. *Tropiano, supra,* 418 F.2d at 1076-77. Here evidence demonstrated that Hudson Cement and Callanan Industries, two of the principal victims of Daley's scheme, were engaged in interstate commerce:

Hudson, through its out of state shipments of cement, and Callanan, through its construction work on the New York Thruway. Clearly, the resources of both companies were depleted by the extortion. The consequent impairment of their ability to carry on business in interstate commerce also brings Daley's offense within the ambit of the Hobbs Act.[4] We hold therefore that there was a sufficient interstate nexus established to support the conviction.

B. Appellant urges that there was insufficient evidence to establish "reasonable fear" in the minds of the victims as is required for a Hobbs Act conviction. *United States* v. *Rastelli*, 551 F.2d 902 (2d Cir.), cert. denied, 46 U.S.L.W. 3216 (U.S. Oct. 4, 1977). The Hobbs Act, § 1951(b)(2), provides that the "term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ." There is no claim made that the jury was improperly charged. What we said in *Rastelli* is applicable here:

> Essentially appellants are attempting to reargue the evidence, urging upon us as facts what are basically

4 Appellant's contention that *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975) precludes the application of the "depletion of assets" theory in this case is incorrect. The victim in *Merolla* was not a professional contractor but rather entered a "one shot deal" to build an auto showroom for the defendant. *Addonizio, supra*, was distinguished in *Merolla* on the basis that the victim there was not maintaining an "ongoing business" in interstate commerce. Id. at 55. Here Callanan was engaged in the construction of a highway to serve interstate commerce and Hudson Cement made shipments in interstate commerce.

Appellant also urges that in light of *Merolla* it was error for Judge Lasker to charge the jury that a potential rather than an actual effect on interstate commerce satisfied the jurisdictional requirement of the Hobbs Act. The argument is without merit. Aside from the factual distinctions between the cases, the charge given fully accords with our holding in *United States* v. *Augello, supra*, 451 F.2d at 1170. Moreover, *Merolla* did not purport to alter the rule that a potential effect on interstate commerce brings an offense within the scope of the Hobbs Act. See *United States* v. *Merolla, supra*, 523 F.2d at 55.

> inferences favorable to the defendants but which were rejected by a properly instructed jury. It is basic that we must view the evidence in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Under this test appellants must fail.

Id. at 905.

A reading of the record here reveals testimony by both employees and employers of Local 445 that they would lose their jobs or that their business would be injured if they failed to comply with Daley's requests transmitted through his agents and the named but unindicted co-conspirators, Alecca and Clausi. Daley was the principal officer of the Local for fifteen years and there was evidence of his power to influence adversely the economic interests of both union members and employers. The materials involved here were substantial and were provided at considerable expense of time, effort and money by the victims of Daley's extortion. While there was testimony by some that they complied willingly with Daley's demands, their credibility was a matter for the jury to determine. We have no difficulty in finding that there was sufficient evidence to justify a finding that there were victims who complied with Daley's demands out of a reasonable fear of retaliation if they failed to do so. Again it was the jury's prerogative to reject the defense contention that the benefits bestowed on Daley, the sole beneficiary of these transactions, were prompted by friendship for an innocent and unwitting donee.

C. Appellant argues that Daley's activities must amount to "racketeering" before a Hobbs Act violation can be established. The contention is totally without merit. This court, in recently upholding a Hobbs Act conviction based

on a single incident of commercial bribery by the purchasing agent of a private corporation, explicitly rejected the concept that the Hobbs Act definition of extortion is limited to prosecutions involving organized crime. *United States* v. *Brecht*, 540 F.2d 45, 52 (2d Cir. 1976), cert. denied, 429 U.S. 1123 (1977).[5] Moreover, the corrupt abuse of the power of a union official in our view is precisely the type of activity which the Act was designed to embrace, see, e.g., *United States* v. *Enmons*, 410 U.S. 396, 400 (1973); and cases cited in *United States* v. *Brecht*, *supra*, 540 F.2d at 51, and indeed is a form of labor racketeering.

III

Appellant makes other arguments which we find unpersuasive. In 1970 Judge Lasker presided over a civil trial involving a claim of an unfair labor practice against Local 445. Daley and Local official Raymond Ebert, both of whom testified in Daley's defense in the trial below, were witnesses in that proceeding. In the civil case Judge Lasker stated that it was impossible to reconcile the testimony of Daley and Ebert, the only two witnesses for the Local in that action, without finding that one of them had been untruthful. Ten days after commencement of the present criminal trial and seven months after assignment of the case to Judge Lasker, Daley made a motion for recusal which was denied by Judge Lasker. The motion was properly denied. There was no showing or even suggestion that Judge Lasker had the "personal bias" required by

5 Daley's argument that the Hobbs Act proscribes only organized racketeering activity is premised on two cases, *United States* v. *Culbert*, 548 F.2d 1355 (9th Cir.), cert. granted, 46 U.S.L.W. 3214 (U.S. Oct. 4, 1977); *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976). However, neither case involved the illegitimate labor union activities encountered here, which the Hobbs Act was mainly designed to thwart. *United States* v. *Enmons*, 410 U.S. 396, 400 (1973); *United States* v. *Brecht*, *supra*, 540 F.2d at 51.

28 U.S.C. §§ 144, 455(b)(1). *United States* v. *Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977).

Even under the broader standard of the new § 455(a), which provides that a judge shall disqualify himself in a proceeding where "his impartiality might reasonably be questioned,"[6] Judge Lasker properly denied the motion for recusal. Of course it is most significant that the alleged prejudice appellant complains of here originated only in a prior judicial ruling. See *United States* v. *Bernstein*, 533 F.2d 775, 784-85 (2d Cir.), cert. denied, 429 U.S. 998 (1976). There may be instances in which a judge's behavior during prior judicial proceedings can demonstrate sufficient friction between the judge and the complaining party to support a finding of bias, see *Wolfson* v. *Palmieri*, 394 F.2d 121, 124-25 (2d Cir. 1968); 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3542 at 352-53, but such was certainly not the situation in this case. In fact, Daley makes no specific allegations that Judge Lasker conducted *either* trial in a manner which even faintly suggested bias on his part. Appellant's position is also undermined by Daley's protracted delay before moving for recusal in the district court, despite his actual knowledge of a prior judicial encounter with Judge Lasker. See *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (4th Cir. 1974). Defense counsel's protestations that he was unaware of Judge Lasker's previous involvement with Daley are unconvincing since the facts were clearly known to Daley himself and, as a matter of public record, were at all times ascertainable by counsel. See *Hirschkop* v. *Virginia State Bar Association*, 406 F. Supp. 721, 724 (E.D. Va. 1975). Moreover, the same firm that represented Local 445 in the civil action assisted the prep-

6 28 U.S.C. § 455(a) provides: "Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

aration of Daley's defense below. Appellant's motion was also rendered untimely by the fact that ten days of trial, with all the attendant expenditure of judicial resources, preceded the recusal motion. See *Smuck* v. *Hobson*, 408 F.2d 175, 182-83 (D.C. Cir. 1969). Under these circumstances, appellant can hardly maintain that Judge Lasker's impartiality could reasonably be questioned.[7] Cf. *United States* v. *Wolfson, supra; United States* v. *Cowden*, 545 F.2d 257 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977).

We further find that the record supports the introduction of hearsay statements by Alecca and Clausi, Daley's unindicted co-conspirators. The Government need only establish by a fair preponderance of the evidence independent of hearsay statements, that Daley was a participant in the conspiracy. *United States* v. *Stanchich*, 550 F.2d 1294, 1297-98 (2d Cir. 1977). The evidence set forth in Part I of this opinion amply attests to Daley's continuing demands upon his victims and his awareness of the source and nature of the benefits obtained. The submission of the conspiracy count to the jury under the standard set forth in *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972) was entirely proper in our view. A jury could fairly find guilt beyond a reasonable doubt here on the basis of the inferences they might justifiably have drawn from the evidence and their determination of the credibility of the witnesses.[8]

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7 The result is the same here whether the reasonableness of the objection to Judge Lasker's impartiality is viewed from Daley's perspective or from that of a disinterested observer. See *United States* v. *Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977); *Parrish* v. *Board of Commissioners of the Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976).

8 The standard of *United States* v. *Taylor, supra*, is

"whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

Id. at 243.

Appellant's arguments regarding improprieties in the proceedings before the Grand Jury have been waived since they were not raised before trial as required by Fed. R. Crim. P. 12(b)(2). *United States* v. *McGrath*, 558 F.2d 1102, 1105-06 (2d Cir. 1977); *United States* v. *Blitz*, 533 F.2d 1329, 1344 (2d Cir.), cert. denied, 429 U.S. 819 (1976). Moreover, appellant's arguments are meritless. *United States* v. *Marchand*, Dkt. No. 77-1131, slip op. 53-1, at 5426 n.29 (2d Cir. Aug. 22, 1977).

We have carefully considered the other matters raised by appellant and have found them also to be without merit.

The judgment of conviction is therefore affirmed.

Appendix B—Statutes Involved

Title 18, United States Code, Section 1951, states:

"§ 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Pos-

session of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect Section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

Title 29, United States Code, Section 186(b)(1), (d), states:

"(b)(1): It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

"(d): Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

Title 28, United States Code, Section 455 provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper,

in his opinion, for him to sit on the trial, appeal or other proceeding therein."

Title 28, United States Code, Section 144 (1970) provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

Appendix C—Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of October, one thousand nine hundred and seventy-seven.

Present:

HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

77-1262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THEODORE G. DALEY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix C—Judgment

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By /s/ ARTHUR M. HELLER
Deputy Clerk